STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN CHIROPRACTIC ASSOCIATION, formerly known as MICHIGAN CHIROPRACTIC COUNCIL, and KEN HUGHES, DC,

Plaintiffs-Appellants,

v

COMMISSIONER OF THE OFFICE OF FINANCIAL AND INSURANCE SERVICES, and BLUE CROSS BLUE SHIELD OF MICHIGAN,

Defendants-Appellees.

UNPUBLISHED
February 14, 2006

No. 264701
Ingham Circuit Court
LC No. 04-000356-CK

Before: Wilder, P.J., Zahra, and Davis, JJ.

PER CURIAM.

Plaintiffs, the Michigan Chiropractic Association (MCA) and Ken Hughes, DC (Hughes), appeal by right an order granting defendants, Commissioner of the Office of Financial and Insurance Service (Commissioner) and Blue Cross Blue Shield of Michigan (BCBSM), summary disposition. We affirm.

On appeal, plaintiffs first claim that the circuit court, under MCL 550.1619(3), must do more than compel the Commissioner to conduct a review of the Provider Class Plan. We disagree.

"[W]hether the trial court has subject-matter jurisdiction over a claim is a question of law that this Court reviews de novo." *Genesis Center, PLC v Fin and Ins Ser Commr*, 246 Mich App 531, 540; 633 NW2d 834 (2001), citing *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000); see also *Rudolph Steiner School of Ann Arbor v Ann Arbor Charter Township*, 237 Mich App 721, 730; 605 NW2d 18 (1999), citing *Blair v Checker Cab Co*, 219 Mich App 667, 671; 558 NW2d 439 (1996) ("[s]ummary disposition pursuant to MCR 2.116(C)(4), for lack of [subject-matter] jurisdiction, is proper when a plaintiff has failed to exhaust its administrative remedies.") In addition, "[w]e review de novo the interpretation and application of a statute as a question of law." *Eggleston v Bio-Medical Applications of Detroit, Inc*, 468 Mich 29, 32; 658 NW2d 139 (2003).

The circuit court properly dismissed plaintiffs' claim in this regard as moot. The NHCCRA,

> "does not grant a health care provider the right to sue a health care corporation directly. Only the Attorney General and the Insurance Commissioner are entitled to enforce the act directly against a health care corporation. Additionally, a person seeking to compel compliance with, or enforcement of, the act has a right to bring an action in the Ingham Circuit Court to compel the commissioner to enforce the act. The only private right of action directly against a health care corporation authorized by the act is an action by a subscriber against a health care corporation for damages. Because this statute only explicitly allows a private right of action by a subscriber, we conclude that no other private rights of action directly against a health care corporation are authorized. [*BPS Clinical Laboratories v Blue Cross and Blue Shield of Michigan*, 217 Mich App 687, 698; 552 NW2d 919 (1996) (citations ommited).]
>
> MCL 550.1619(3) expressly provides that:
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> A political subdivision of this state, an agency of this state, or any person may bring an action in the circuit court for Ingham county for declaratory and equitable relief against the commissioner or to compel the commissioner to enforce this act or rules promulgated under this act.

In *Genesis, supra,* this Court addressed the above statute in a case in which "[t]he crux of the plaintiffs' argument involve[d] BCBSM's provider class plan and whether [the Commissioner's] review of the plan can fully address plaintiffs' claims." *Id*. at 549. The *Genesis* plaintiff specifically alleged that BCBSM applied certain criteria in a discriminatory manner to deny it participating provider status based on ownership in violation of MCL 550.1502(8). *Id*. at 540. After reviewing the administrative process of reviewing provider plans under NHCCRA,[1] the *Genesis* Court stated that:

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[1] The Legislature expressly granted health providers legal rights to participate in the administrative process are set forth in MCL 550.1505, which provides that:

> (1) A health care corporation shall establish and implement procedures to obtain advice and consultation from a provider class, either through individual providers of that class or through 1 or more organizations or associations that represent the provider class, in any combination, in the development of the provider class plan. A health care corporation may negotiate with 1 or more organizations or associations that represent providers in the relevant provider class in the development and modification of the provider class plan and objectives and methods for implementing that plan.
>
> (2) The commissioner shall establish and implement procedures whereby any person, including a subscriber, may offer advice and consultation on the development, modification, implementation, or review of a provider class plan.
>
> (3) A health care corporation shall establish and implement procedures to obtain advice and consultation from subscribers in the development and modification of

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> [T]he Legislature explicitly directed the commissioner to regulate and supervise nonprofit health care corporations like BCBSM. Although plaintiffs are correct in stating that subsection 619(3) allows them to bring an action in the Ingham Circuit Court, we do not believe that subsection 619(3) allows the circuit court to conduct the same type of review that the commissioner has authority to conduct under the NHCCRA. The circuit court would be exceeding its authority if it were to conduct a comprehensive review of the provider class plan as plaintiffs requested in this case. Instead, we read subsection 619(3) as presenting an appropriate avenue by which the circuit court can compel the commissioner to enforce the NHCCRA, e.g., to conduct a provider class plan review to determine if BCBSM is discriminating against surgical facilities not owned by hospitals. [*Genesis Center, PLC, supra* at 543-544 (citations omitted).]

The Court explained that requiring the exhaustion of administrative remedies was appropriate given:

> (1) an untimely resort to the courts may result in delay and disruption of an administrative scheme; (2) any type of appellate review is best made after the agency has developed a full record; (3) resolution of the issues may require the technical competence of the agency, and (4) the administrative agency's settlement of the dispute may render a judicial resolution unnecessary. [*Id*. citing *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 53; 620 NW2d 546 (2000), quoting *Int'l Business Machines Corp v Dep't of Treasury*, 75 Mich App 604, 610; 255 NW2d 702 (1977).]

We conclude that *Genesis* requires the remaining allegations of plaintiffs' complaint in this regard be dismissed. The MCA, as entitled under MCL 550.1505, submitted comments to the Commissioner that addressed the concerns reflected in their complaint. A memorandum summarizing the comments submitted on the BCBSM Chiropractor Provider Class Plan reveals that the MCA raised additional concerns than those included in the complaint. The Commissioner's issued an extensive determination report that included a "summary of advice and consultation," which incorporated as an appendix the above mentioned memorandum of comments submitted by the MCA. The determination report then discusses the goals of the reimbursement arrangement under the Chiropractor Provider Class Plan.[2] In doing so, the

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the provider class plan and objectives for implementing that plan.

Further, the NHCCRA grants providers the right to appeal "any action or determination of the commissioner" in this regard to an independent hearing officer, MCL 550.1515, which also may, on leave granted, be considered by this Court. MCL 550.1518.

[2] These goals are contained in MCL 550.1504, which provides:

(1) A health care corporation shall, with respect to providers, contract with or enter into a reimbursement arrangement to assure subscribers reasonable access to, and reasonable cost and quality of, health care services, in accordance with the following goals,

(a) There will be an appropriate number of providers throughout this state to assure the availability of certificate-covered health care services to each subscriber.

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determination report extensively addresses the concerns raised in the instant complaint. Here, the Commissioner's review of the Chiropractor Provider Class Plan fully addresses plaintiffs' claims. *Genesis, supra* at 549.[3] The circuit court properly concluded that plaintiffs failed to exhaust their administrative remedies.[4]

Plaintiffs' only specific contention of inadequacy of the review is that the Commissioner arbitrarily selected to review calendar years 2002-2003. However, MCL 550.1505(4) and (6) requires the Commissioner consider certain information in making a determination report. There is no indication that, at the time the Commission began its review in February 2005, the Commissioner had access to the required information for more recent calendar years. Thus, we reject plaintiffs' argument that the Commissioner's review of calendar year 2002-2003 was arbitrary.

For these reasons, the circuit court correctly concluded that plaintiffs' claims were moot. An issue is moot and should not be addressed if the court can no longer provide a remedy. *Detroit Edison Co v Michigan Public Service Commission*, 264 Mich App 462, 474; 691 NW2d 61 (2004), citing *Eller v Metro Industrial Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004). As noted in *Genesis, supra* at 543 n 7, it is unnecessary to address plaintiffs' claims of BCBSM's alleged misconduct where the Commissioner has already made a determination regarding BCBSM's conduct. Although here the Commissioner had not completed this review, at the time the circuit court issued its decision, the Commissioner had begun reviewing BCBSM's provider plan. In addition, at this time plaintiffs were able and did participate in the

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(b) Providers will meet and abide by reasonable standards of health care quality.

(c) Providers will be subject to reimbursement arrangements that will assure a rate of change in the total corporation payment per member to each provider class that is not higher than the compound rate of inflation and real economic growth.

[3] Notably, on August 31, 2005, the MCA appealed the Commissioner's determination of Chiropractor Provider Class Plan to an independent hearing officer under MCL 550.1505.

[4] Further, MCL 550.1619(3) only provides for "declaratory and equitable relief," and a party must still meet the requirement for declaratory relief under MCR 2.605(A)(1), which authorizes the circuit court to provide declaratory relief "[i]n a case of actual controversy . . . ." *Id.* at 544, 544 n 9. "An actual controversy exists when 'a declaratory judgment is necessary to guide a plaintiff's future conduct in order to preserve the plaintiff's legal rights.'" *Genesis Center, PLC, supra* at 544. (Citations omitted.)

In *Genesis Center, PLC, supra*, this Court held that:

> Plaintiffs failed to prove an actual controversy because the provider plan review process set out in MCL 550.1509 through 550.1518 provides plaintiffs with the ability to preserve their legal rights. A further declaration by the circuit court was unnecessary to protect plaintiffs' rights. Thus, the circuit court properly dismissed plaintiffs' claim for declaratory relief. [*Id*. at 545-546.]

Here, likewise, the described administrative review process affords plaintiffs the ability to preserve their legal rights. Thus, there is no "actual controversy."

administrative action. The circuit court could no longer have provided a remedy, and therefore, plaintiffs' claim is moot.

Plaintiffs next argue the circuit court improperly dismissed their claim that BCBSM violated Michigan public policy in terminating its Professional Provider Participation Agreement with Hughes based on his exercise of free speech. We disagree.

The circuit court granted defendants summary disposition pursuant to MCR 2.116(C)(8).

> This Court reviews de novo a trial court's decision on a motion for summary disposition. Under MCR 2.116(C)(8), a motion for failure to state a claim for which relief can be granted tests the legal sufficiency of the pleadings. All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. Summary disposition under MCR 2.116(C)(8) is proper when a claim is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery. [*Allen v MGM Grand Detroit, LLC*, 260 Mich App 90, 93; 675 NW2d 907 (2003) (citations omitted).]

As the circuit court recognized, "[b]oth the United States and Michigan Constitutions guarantee the . . . right to free speech." *Prysak v RL Polk Co*, 193 Mich App 1, 10; 483 NW2d 629 (1992). Further, "the federal and the Michigan constitutional provisions guaranteeing free speech do not extend to private conduct, but have been limited to protection against state action." *Id*. citing US Const, Am I; Const1963, art 1, § 3; *Hudgens v NLRB*, 424 US 507, 513; 96 S Ct 1029; 47 L Ed 2d 196 (1976); *Woodland v Michigan Citizens Lobby*, 423 Mich 188, 212; 378 NW2d 337 (1985). Thus, the threshold question here is whether BCBSM is a state actor.

We conclude that BCBSM' termination of its Professional Provider Participation Agreement with Hughes is not state action.

"BCBSM is a unique creation. It is a non-profit, tax exempt 'charitable and benevolent institution,' incorporated pursuant to special enabling legislation enacted by the Michigan Legislature in 1939, for the purpose of providing a mechanism for broad health care protection to the people of the State of Michigan." *Blue Cross and Blue Shield of Michigan v Demlow*, 403 Mich 399, 415-416, 270 NW2d 845 (1978) (citation omitted). "Although BCBSM is regulated by the Commissioner, it is not managed by the Commissioner. It has its own officers and a board of directors to which management of the corporation is statutorily entrusted." *Id*. at 418 (citations omitted). "BCBSM has a direct and distinct contractual relationship . . . with the participating providers." *Id*. at 417.

Although BCBSM is a unique creation subject to extensive regulation, decisions to enter directly into distinct contracts with providers are made by BCBSM' management, which is private. Therefore, the challenged action, BCBSM' termination of its Professional Provider Participation Agreement with Hughes, cannot be attributed to the State itself. See *Scalise v Boys Scouts of America*, 265 Mich App 1, 22; 692 NW2d 858 (2005). Accordingly, there is no state action, and because "the federal and the Michigan constitutional provisions guaranteeing free speech do not extend to private conduct," *Prysak, supra*, the circuit court properly dismissed Hughes' claim.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Brian K. Zahra
/s/ Alton T. Davis